


COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality Programs
Ellen Gilinsky, Director

Subject: Guidance Memorandum Number 05-2003
Revisions to the Virginia Water Protection General Permits 9VAC25-660, 9VAC25-670, 9VAC25-680, 9VAC25-690 (Effective 1/26/05)

To: Regional Directors

CC: Deputy Regional Directors, Regional Water Protection Permit Managers and Program Staff

From: Ellen Gilinsky, Ph.D., Director 

Date: February 28, 2005

Summary:

The Virginia Water Protection General Permits were first promulgated in October 2001. Revisions occurred in 2004 which became effective on January 26, 2005. The purpose of this guidance is to summarize key changes to the general permits (GPs) and discuss transition issues between old and new regulations.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov/water/>.

Contact information:

Please contact Catherine Harold, Virginia Water Protection Permit Program Manager, at 804-698-4047 or mcmharold@deq.virginia.gov if you have any questions about the revised VWP General Permits.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Revisions to the Virginia Water Protection General Permits
9VAC25-660, 9VAC25-670, 9VAC25-680, 9VAC25-690
(Effective 1/26/05)

Background:

Four Virginia Water Protection General Permits (GPs) were first promulgated in October 2001. Revisions to all four of the GPs were made in 2004 through the APA process; these revisions became effective on January 26, 2005, at which time the original GP regulations were replaced by the revised GP regulations.

The purpose of the revisions was to correct several administrative procedures, clarify application and permitting requirements, and allow for a more efficient application review process. Based on our experience in implementing these regulations, these corrections were needed to improve applications for coverage, timeframes for issuance of authorizations, and coordination with the U.S. Army Corps of Engineers State Program General Permit (SPGP-01). No change to the upper thresholds of coverage under these regulations or to the 2:1 compensation ratio for wetland impacts were considered or implemented during this revision process, but may be considered at a later date when the GPs are reissued. The original expiration dates of the four GPs were not changed by these revisions.

Key Changes:

In general, changes made to the original regulations focused on: (1) the inclusion of certain mining activities to be authorized under the general permit regulation WP4, as reflected in Sections 10, 30, 60, and 100 of 9 VAC 25-690; (2) to clarify application informational requirements; types of compensation allowed; mitigation plan, monitoring, and reporting requirements; and termination process for events beyond permittee's control; (3) to include language concerning refunds of compensation payments and minor clarifications of a grammatical nature; and (4) to revise the Forms section to include version dates and additional document titles.

The following is a list of the major changes to the regulations that may affect how authorizations are processed, reviewed, issued, denied or revised. This list does not substitute for careful review of the GP regulations themselves to ensure that you are familiar with these changes as you move forward in reviewing and processing GP applications.

1. clarify what is needed to decide that an application is complete, including informational and time requirements (Section 60);
2. allow for payments to mitigation bank or in-lieu fee funds to be linked to the start of work in jurisdictional areas rather than to the date of authorization issuance (Section 70 and Section 100 Part IIA of permit authorization);
3. modify the procedure for pre-construction notification to include limit of 300 linear feet on streams (Section 50A);
4. allow the permittee to decrease impacts and associated compensation through a Notice of Planned Change instead of having to terminate and reissue the authorization (Section 80B);

5. clarify the section on protection of non-impacted wetlands on the project and mitigation sites that are within 50 feet of permitted activities (Section 100 Part IC of permit authorization);
6. allow for termination of authorizations without penalty when the project does not go forward (Termination by Consent, Section 90);
7. clarify exceptions to coverage section for consistency between the general permits (Section 40);
8. specify a timeframe of 60 days prior to expiration of authorization for requests for extension or renewal of general permit authorizations (Section 100, Part IB);
9. clarify requirements for avoidance, minimization and compensation alternatives, such as what types of compensation are acceptable for wetlands, streams, and open water (Section 70);
10. clarify limits to use of multiple general permit authorizations for the same project (Section 40);
11. clarify the distinctions between temporary and permanent impacts and conversion impacts by adding a definition of conversion (Section 10); adding the ratio for conversion impacts (Section 70); revising the definition of temporary impacts (Section 10); removing the requirement for a Notice of Planned change for increase in temporary impacts alone making a written notification and restoration suffice (Section 80); adding definition for permanent impacts (Section 10); and adding temporary or permanent as modifiers throughout the regulation text;
12. clarify lower threshold for reporting only authorizations to include up to one-tenth acre of surface waters, but not more than 300 linear feet of stream channel, to maintain consistency with the U.S. Army Corps of Engineers SPGP-01 requirements (Section 50);
13. simplifies the required information that needs to be submitted for a conceptual or final compensation plan when compensation is via purchase of bank credits or contribution to an in-lieu fee fund (Section 60 B);
14. modify certain construction monitoring requirements, such as photographic documentation requirement, water quality parameter testing methods, and reporting deadlines (Section 100, Part IID and E);
15. make minor grammatical changes throughout for clarity;
16. revise the definition of perennial stream (Section 10).

Transition Issues with regard to Application processing:

As per 9 VAC 25-210-130 G, the following provisions have been developed to guide DEQ permit staff on processing VWP general permits under the revised regulations.

1. All new permit applications received on or after January 26, 2005, as well as permit applications that are currently in the review process, will be issued under the revised general permit regulation rules that became effective on January 26, 2005. The previous version of the general permit *regulations* are null and void, having been replaced by the revised versions. However, any general permit *authorizations* issued prior to January 26, 2005 will remain in full force and effect for their term and do not have to be reissued.

If a permit needs to be re-authorized, then the re-authorization should be processed in accordance with the January 26, 2005 regulations, and the project shall comply with the new regulations. The previous regulations will not be applicable to the project.

2. For any Notice of Planned Change that is received on or after January 26, 2005, process the Notice as per the revised regulation rules, even if their permit was issued under the old regulations. For example, if a permittee with a WP4 authorization dated 2004 submits a Notice of Planned Change for an additional 0.2 acres of wetland impacts, review the request based on the revised regulation for WP4. Another example may be a change in mitigation. Again, review the request as per the criteria in the revised regulations.
3. When processing a Notice of Planned change, use the template letters provided in the 2005 VWP Permit Manual and revise the original permit authorization cover page to include the changes. Do not change the effective or expiration dates on the cover page. Send *only* the letter and signed, revised permit authorization cover page to the permittee, as the conditions in their original permit authorization remain in effect until the authorization expires, and also applies to the planned change.
4. For Continuation of Coverage requests received on or after January 26, 2005 *and that involve continuation for monitoring purposes only* (i.e., *all impacts are taken* and permittee is just finishing up last monitoring report, or is just maintaining erosion and sediment control measures), review and process the request under the revised regulations. A new *application and application fee are not required per 9 VAC 25-210-130G*. Do not issue a new authorization; use the template letters provided in the 2005 VWP Permit Manual.
5. For Continuation of Coverage requests received on or after January 26, 2005 *and that apply to any other aspect of the project except monitoring, including the expiration of the original authorization term*, review and process the request under the revised regulations and issue a *new authorization*. A new application is not required; however, a permit application *fee is required*, regardless of the amount of additional time needed.
6. Permit applications received prior to January 26, 2005 that propose to impact up to one-tenth acre surface waters, must now be processed under the revised regulation rules. These projects were formerly processed as ‘up to one-tenth’ authorizations, but because the regulation now qualifies the reporting-only impacts to be ‘up to one-tenth acre wetlands (or open water) or 300 linear feet of stream channel’, the projects having >300 linear feet of stream impacts no longer qualify for an ‘up to one-tenth’ authorization. In this case, compensation for the stream impacts will be required by DEQ. *Under this special circumstance only*, those applications submitted before January 26, 2005, and that are still under review after that date, will be processed without the additional requirements of submitting a new permit application and permit application fee. Note that the applicant should already be compensating for stream impacts per their Corps’ permit or SPGP determination, and therefore, the requirement for stream compensation by DEQ should not be burdensome.
7. Regarding Section 60 E (Incomplete Application) of each general permit regulation, the last sentence notes the requirement for a new application when the application is not complete. This requirement will reset the application review processing clock, but does not trigger a new permit application number, new permit application fee, or entry of a new CEDS permit record.

Transition Issue with regard to Authorization and Notification in 9 VAC 25-670, -680, and -690 (WP2, WP3, WP4):

The language in Section 50 of WP2, WP3, and WP4 may be confusing as it relates to notification requirements, and thus, compensation requirements for surface water impacts. Until such time that these sections can be revised to clarify this situation, the following table will apply and presents the scenarios that either require an abbreviated JPA and no compensation or a full JPA and compensation.

<u>No Compensation Required</u>	<u>Compensation Required</u>
\leq 1/10 acre wetland/open water	$>$ 1/10 acre wetlands/open water
or	or
\leq 300 linear feet stream channel	$>$ 300 LF stream channel
or	or
\leq 1/10 acre surface waters, and when less than or equal to 300 LF stream channel	$>$ 1/10 acre surface waters
	or
	\leq 1/10 acre surface waters, but more than 300 LF of stream channel

Transition Issue with regard to Authorization and Notification in 9 VAC 25-660 (WP1):

It has come to our attention that the notification requirements in the WP1 (9 VAC 25-660-50) may be confusing because they reference that notification to the board is required for wetland or open water impacts greater than 1/10 acre or permanent stream channel impacts greater than 300 linear feet (LF), *which includes both intermittent and perennial channels*. However, the WP1 only authorizes impacts up to 125 LF of *perennial* stream channel. Thus, notification is really required for stream impacts up to 125 LF under WP1, since the 300 LF notification limit may include perennial impacts that exceed the 125 LF permit use limit.

Until such time that these sections can be revised to clarify this situation, the following procedures will apply:

If the proposed WP1 project impacts less than 300 linear feet (and not more than 125 linear feet of perennial stream channel), then the project qualifies under the WP1 with no compensation required.

If the project impacts are greater than 125 LF of perennial stream channel (but under 300 LF), then the project does not qualify for the WP1, since the use threshold for WP1 is exceeded. Any project falling into this category may qualify under the WP4 with no compensation required instead.